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Title VI - Is Executive Order 12,898 Growing Teeth? - MAJ Michael A. Corbin

Title VI of the Civil Rights Act of 1964[1] is an emerging environmental litigation issue that has caused the U.S. Environmental Protection Agency (EPA) to start developing policy addressing the influx of Title VI claims. This development affects other federal agencies as they are bound to enforce Title VI through their implementing agency regulations. Today, Title VI is viewed by many as the instrument to give teeth to Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.[2]

The Presidential directive accompanying Executive Order 12,898 directs federal agencies to attempt to ensure compliance with Title VI for federally funded programs affecting human health or the environment.[3] Title VI prohibits federally funded programs and activities from discriminating on the basis of race, color, or national origin. The EPA currently provides about $4.3 billion of Federal financial assistance under 44 different programs to approximately 1,500 recipients. States, who are among these recipients, have recently experienced a substantial increase in Title VI claims that allege they have implemented their federally funded environmental programs in a discriminatory manner.

The federal government has broadly interpreted Title VI claims involving state actions.[4] In a case involving Chester, Pennsylvania, for example, the U.S. Department of Justice (DOJ), on behalf of the EPA, filed an *amicus curiae* brief in the United States Court of Appeals for the Third Circuit that supports a privately enforceable discriminatory effects standard in federal court.[5] This brief specifically rejects the District Court's narrow interpretation of EPA's implementing regulation.

The DOJ argument to the Third Circuit relies on established jurisprudence that clearly supports private parties acting as "private attorneys general" to enforce the mandate of Title

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1 Civil Rights Act of 1964, U.S. Code, vol. 42, sec. 2000d (1964).
2 Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).
3 Memorandum on Environmental Justice, 30 Weekly Comp. Pres. Doc. 279-280 (Feb. 11, 1994).
4 Title VI claims may include emotional effects according the Department of Interior. In Ward Valley, California, DOI included emotional distress within the scope of discriminatory effects during its investigation of a low-level radioactive waste facility siting.
5 *Chester Residents Concerned for Quality Living, et.al., v. James M. Seif*, No. 96-3960, U.S. District Court E.D. Pa. (November 5, 1996).

VI and the implementing regulations.[6] It also asserts that according to the EPA, the proponent of the regulation, a private individual can have standing to bring a claim alleging that the EPA's funding recipients not administer their programs in a manner that causes unjustified, unintentional discriminatory effects.[7] If the Third Circuit adopts the DOJ proposition, then private party plaintiffs may prevail without meeting the often-overwhelming burden of proving discriminatory intent.

The increase of Title VI claims represents a trend that could significantly affect Army environmental programs, policies, and practices. Obviously, Title VI challenges could adversely impact Army actions by causing delay, termination or serious public scrutiny of Army environmental programs. Therefore, in accordance with the Department of Defense, Strategy on Environmental Justice, the Army should seriously reconsider programs, policies, and practices that could be adversely affected by Title VI litigation.

Services and OSD Meet with EPA to Talk Stormwater - MAJ Silas DeRoma

On 18 November 1997, representatives from the Services and OSD met with the EPA Office of Water to discuss the EPA's upcoming Stormwater Phase II Rule. The proposed rule will provide a comprehensive stormwater program that designates and controls additional sources of stormwater discharges to protect water quality. Current regulations, commonly known as Stormwater Phase I, only apply to stormwater discharges associated with certain industrial activities, certain municipal separate storm sewer systems,[8] stormwater discharges with permits issued before 4 February 1987, and those stormwater discharges determined to violate water quality standards or significantly contribute pollutants to the waters of the United States.

The proposed regulation will require National Pollutant Discharge Elimination System (NPDES) permits for small municipal separate storm sewer systems (MS4) located in any incorporated place, county, or place under the jurisdiction of a governmental entity within an . . . "urbanized area."[9] The regulation will require such owners or operators to develop, implement, and enforce a local stormwater management program designed to reduce the discharge of pollutants to the maximum extent practicable and to attain water quality standards. The permitted small MS4 must also describe management practices to be

[6] See *Cannon v. University of Chicago*, 441 U.S. 677, 705-706 (1979); *Chowdhury v. Reading Hosp. & Med. Ctr.*, 677 F.2d 317, 319 (3d Cir. 1982), *cert.denied*, 463 U.S. 1229 (1983).

[7] Brief of the United States as *Amicus Curiae* in Opposition to Defendants' Motion to Dismiss, *Chester Residents, et.al. v. Sief et.al.*, No 96-3960, U.S. District Court E.D. Pa. (August 23, 1996), 9-22.

[8] Phase I regulated those municipal separate storm sewer systems serving populations from 100,000 to 250,000 and also those municipal separate storm sewer systems serving populations greater than 250,000.

[9] Those owners or operators outside of an urbanized area may be included under the regulations if they have existing or potential significant water quality impacts, as determined by criteria set by their respective permitting authorities. The proposed regulations also will apply to construction activities greater than 1 acre.

implemented and measurable goals for each of the following minimum control measures:

1. Public education and outreach on stormwater impacts
2. Public involvement/participation
3. Detection and elimination of illicit connections and discharges
4. Control of construction site stormwater runoff
5. Post-construction stormwater management in development/redevelopment.

DoD asked to meet with EPA because EPA included federal facilities in the definition of "municipal" separate storm sewer systems in the proposed regulation. The EPA also stated in the proposed regulation that federal facilities were included in this definition to "address an omission from existing regulations and to clarify that federal facilities are . . . covered by the NPDES program for municipal stormwater discharges when the federal facility is like other regulated municipal storm sewer systems." The DoD representatives provided several illustrations to EPA of cases where application of municipality requirements would create burdensome regulatory requirements for installations or would not be feasible. For example, requirements for public outreach/participation are not always necessary on a military installation where an installation commander can regulate environmental impacts by establishing uniform standards and practices for on-post housing areas. Also, military installations usually have neither permit authority nor the administrative capability to monitor construction activities on their installations to the same extent as a municipality that is often also acting as the permit authority for construction activities.

The EPA acknowledged the DoD comments, noted that some of the circumstances raised had not been considered, and agreed that in some cases application of the requirements would be unfeasible. Consequently, the EPA invited DoD comments on the proposed regulations after they are issued - at some time near the end of 1997. Installation ELSs are encouraged to examine the proposed regulation when it is issued and discuss its impacts with their installation environmental staff. ELD will be providing comments to EPA and installation-specific examples from the field are encouraged. To obtain a copy of the proposed rule, go to **Error! Bookmark not defined.**. Click on "FACA," click on "Storm Water Phase 2 FACA Subcommittee Area," and select "Preamble and Rule Preliminary Drafts." Please be aware that the version available at this site is expected to be slightly different from the version to be released.

Negotiations on North American Agreement on Transboundary Environmental Impact Assessment- MAJ Mike Egan

As part of the North American Free Trade Agreement (NAFTA) legislation,[10] the NAFTA parties entered into the North American Agreement on Environmental Cooperation (NAAEC). The NAAEC in turn established a Council of Environmental Cooperation (CEC), which consists of the environmental ministers of the three NAFTA parties. Article 10.7 of the NAAEC calls upon the Council to develop recommendations with a view to agreement with respect to notification, consultation, assessment, and mitigation concerning certain proposed projects likely to cause significant adverse transboundary impacts. Accordingly, in June 1997, the Council issued a resolution announcing the decision of the parties to negotiate and complete a legally binding agreement on transboundary environmental impact

[10] 19 U. S. C. 3301 (1997)

assessment (TEIA Agreement). This resolution set a target date of April 1998 for completion of the TEIA Agreement.

The Administration supports the negotiation of a TEIA Agreement, as it would establish a formal process for obtaining notification at an early stage of proposed Canadian and Mexican physical projects that are likely to have significant adverse impacts on the U.S. environment and for voicing U.S. concerns. The TEIA Agreement would, therefore, provide the United States government and its citizens with an opportunity to participate in Canadian and Mexican governmental decisions about projects to ensure that U.S. concerns are taken into account.

Representatives from the services and OSD are participating in an interagency working group, chaired by the State Department, to formulate the U.S position to be taken in negotiations with Canada and Mexico. One representative from DoD has taken part in the first two negotiating sessions held in Montreal, Canada, on September 11-12 and November 17-18, respectively. U.S. negotiators have and will continue to focus on ensuring that the TEIA Agreement includes the following principal elements:

Notification. There will likely be two bases for notification: (1) designated categories of physical projects located within 100 km of the United States-Mexico and United States-Canada borders without a requirement for an individualized determination of transboundary environmental impacts; and (2) proposed projects that the originating country determines have the potential to cause significant adverse transboundary environmental impacts even if not located within 100 km of the border. The U.S. proposal provides that, for the United States, with the exception of notification of projects permitted by the states pursuant to programs authorized by the Environmental Protection Agency, only major actions as defined under the National Environmental Policy Act (NEPA) subject to decisions by the U.S. Federal government would be included in the scope of the TEIA Agreement.

Information Sharing Between Countries. The TEIA Agreement should provide for the timely and open exchange of pertinent information and views regarding proposed projects.

Assessment. Whereas notification of a proposed project is to be based in part on an automatic trigger, e.g. proximity to the border, the obligation to perform a transboundary environmental impact assessment would be triggered by a determination that the project is likely to cause significant adverse transboundary environmental impacts. This standard is similar to the standard for determining whether an Environmental Impact Statement (EIS) is required under U.S. law. The country in which the a proposed project would be located would make the determination whether a transboundary environmental impact assessment is required. Once a determination is made, the potentially affected country and its public would be given the opportunity to provide comments on and participate in the assessment process, including public hearings, subject to national laws and regulations.

Mitigation. The TEIA Agreement is expected to require countries to consider measures to mitigate significant adverse transboundary environmental impacts as early as possible during the transboundary environmental impact assessment process.

Public Participation. Public participation will be critical to the success of the transboundary environmental impact assessment. Procedures under the TEIA Agreement will provide the publics of all affected parties the same access to information and opportunities for participation.

Involvement of States. Given existing law, the TEIA Agreement will need to be limited to federal actions. It should be noted, however, that federal actions affected by the TEIA Agreement would include state and local actions proposed for federal funding, permitting, licensing, or other approvals. In addition, a TEIA Agreement would affect state, local, and tribal governments who participate in the implementation of federal environmental assessment laws, specifically those governments who presently administer certain Department of Housing and Urban Development NEPA programs. In light of the critical role the states and tribes play in U.S. environmental programs, the administration believes that voluntary state and tribal involvement is an important component of the overall approach to TEIA. Some border states and Indian Tribes currently have procedures for consultation with neighboring Mexican states or Canadian provinces. State and tribal officials were included in the U.S. delegation to the CEC intergovernmental group that developed the TEIA recommendations, and the U.S. delegation has included state and tribal observers at previous negotiating sessions. Additionally, the Department of State and other involved U.S. Executive Branch agencies will be consulting with officials from border states during the negotiations to ensure that the TEIA Agreement is developed in a manner consistent with ongoing U.S.-Mexico and U.S.- Canada border initiatives.

Implementation. The U.S. expects to use existing procedures under U.S. law to implement a TEIA Agreement.

Environmental Issues in Outsourcing and Privatization - Major Lisa Anderson-Lloyd

In this time of reduced funding, outsourcing and privatization are two alternatives by which installations can ensure that Army functions and services meet mission requirements while conforming with increasingly stringent environmental regulations. Privatization is the transfer of ownership, operation, maintenance, and improvement of Army utility plants and systems to a municipal, private, local, or regional utility authority. Outsourcing is a contracting out of those functions and services that are not considered “core” competencies of the installation.

Outsourcing

Outsourced environmental activities fall within the following areas: environmental compliance, pollution prevention, waste disposal, and environmental remediation. In the area of compliance, some installations have outsourced their technical environmental engineering support to obtain the necessary assistance for their overburdened environmental program. In order to achieve and maintain environmental compliance, installations often contract for monitoring and testing required by permits or statutes. Carefully drafted contract provisions and contractor oversight are essential to ensure the validity of the test results and their acceptability to the regulators. Installation personnel must monitor the methodology used by the contractor to guarantee appropriate sampling and laboratory methods are being used.

Pollution prevention and hazardous waste minimization programs are a focus for many installations in outsourcing. Not only can installations reduce hazardous waste disposal costs, but they may also reduce potential liability for future hazardous waste cleanups. It is Army policy to reduce the quantity or volume and toxicity of hazardous waste generated by Army operations and activities when it is economically feasible or environmentally sound. The procurement process is the means to obtain pollution

prevention equipment as well as services. One method that avoids the traditional treatment of waste is recycling. When contracting to recycle hazardous waste, contracting and environmental personnel must ensure that new regulatory and policy considerations concerning recycling are included in the solicitation.

In the area of waste disposal, there are many requirements to consider in addition to the Resource Conservation and Recovery Act waste management regulations, including hazardous waste training, transportation requirements, and additional State and local requirements. The Defense Reutilization Marketing Service (DRMS) is the DoD agent for disposal of hazardous waste generated by the Army (AR 200-1, paragraph 5-3,e (3)). In that capacity, DRMS manages most hazardous waste disposal contracts at installations. Although the use of DRMS is preferred, exceptions allowing the contracting out of hazardous waste disposal is allowed in some instances with MACOM approval. Contracting outside DRMS is performed routinely for the disposal of non-hazardous waste and for waste that DRMS does not handle.

All contracts for hazardous waste disposal must be reviewed by the installation Environmental Coordinator and the Director of Contracting and approved by the Installation Commander. The contractor selection process must include the verification of necessary permits and the contractor's compliance status with regulatory agencies. Both the technical capability of the contractor and an evaluation of previous performance history should be scrutinized. To contract out waste disposal, a detailed description of the waste, including all necessary treatment and disposal requirements must be submitted to bidders. In addition, the prospective contractors must be required to develop a detailed disposal plan to ensure an adequate evaluation of their expertise to dispose of the particular waste.

Although the U.S. Army Corps of Engineers is primarily responsible for managing contracts relating to the Installation Restoration Program (IRP), installations may at times contract in support of IRP remediation activities. The installation is responsible, however, for other remediation contracts such as underground storage tank and asbestos management. It is essential in these contracts to include in the specifications all related tasks that the contractor may need to accomplish. These would include requirements for permits, licensing, training, sampling, monitoring, and regulator notification. Most importantly, installation personnel must stay alert to changing environmental regulations that will affect on the contractor's performance requirements.

Government liability for environmental compliance issues under outsourced activities will vary depending on the terms of the negotiated contract. If the contract is properly drafted, the government should be responsible for an environmental violation only when the deficiency is at the direction of the government, by the terms of the contract, or due to an inadequate government facility. The contract must reflect the intended allocation of risk to the contractor, and the contractor should be required to submit environmental compliance plans as early as the source selection evaluation. Environmental compliance must be made the contractor's responsibility (including obtaining licenses and permits), and failure to comply with laws and regulations should be a basis for termination of the contract for default or other adverse action.

An issue that frequently arises in outsourcing is permit responsibility. It is preferable that the contractor be made responsible for obtaining the permits. This does not, however, insulate the installation from liability for violations of the permit, as explained above. The Installation Commander would sign the permit application for the installation and any sub-installation or supported facilities as the facility "owner," while the contractor would sign as

the "operator." Care should be exercised to delineate responsibilities in the contract, to include payment of fines and penalties levied against the installation as a result of contractor noncompliance.

Absent specific statutory authority, the government cannot enter into indemnity agreements with contractors. There are statutes that authorize indemnification within certain research and development contracts and provide indemnity to cover unusually hazardous risks arising out of the direct performance of the contract. The latter is used to provide indemnification to ammunition plant contractors. The indemnification generally protects the contractor against claims (including litigation or settlement) for personal injury, death, and property damage as a result of a risk defined in the contract.

National Environmental Policy Act (NEPA) requirements must be considered in outsourcing functions and services. Outsourcing may qualify for a categorical exclusion IAW AR 200-2. If the screening criteria in AR 200-2 apply to the proposed action and the action qualifies for the categorical exclusion, the more extensive Environmental Assessment (EA) or Environmental Impact Statement (EIS) will probably not be necessary.

Privatization

Unlike outsourcing, privatization involves a complete transfer of ownership, operation, maintenance, and improvement of an Army facility – typically utility plants and systems. The transfer of these facilities is usually to a municipal, private, local, or regional government entity. Under privatization agreements, the installation shifts from a utility provider to a utility customer. The Army's goal is to privatize one hundred percent of natural gas systems and seventy-five percent of all other utilities by the year 2003.

Through full privatization, the government as a customer avoids liability as either the owner or the operator for compliance with environmental requirements. Typically, under the terms of the transfer, the new owner is responsible for all environmental compliance requirements, as well as maintenance costs, renovation and construction, equipment, manpower, and overhead. The fact that the new facility owner has assumed the permit responsibility does not relieve the Army of all environmental compliance requirements. For example, in the case of a wastewater treatment plant, although the owner is responsible for permitting and operation of the plant, the government as a tenant is responsible for control of the waste streams within the government's buildings.

A private owner's liability for fines and penalties incurred in connection with a facility may be different from the Army's liability because Federal sovereign immunity has not been waived under all environmental statutes. Therefore, even if the Army is responsible for a fine, reimbursement of the private owner may not be permissible. Regardless of whether sovereign immunity for punitive fines and penalties has been waived, the Army is obligated to comply with applicable Federal, state, interstate, and local requirements. Another issue that may arise in connection with privatization is that of remediation of transferred facilities. The facility transfer documents should address any obligation the Army has to clean up Army-caused contamination.

It is unlikely that indemnification would apply in most cases of privatization. Current statutory authority to enter into indemnity agreements would not allow such agreements with private or governmental entities that would take over ownership of Army utilities or wastewater systems.

NEPA must also be considered in any privatization initiative. As there is no categorical exclusion that applies to privatization actions, a proponent must prepare either an EA or an EIS. Because the environmental effects of privatization are rarely significant, however, an EA will normally suffice to determine the extent of environmental impacts.

Conclusion

In many cases, the Army lacks the manpower, funds, and specialized technology to ensure that utility systems reliably meet mission needs. Often funding is insufficient to achieve current industry standards or to satisfy increasingly stringent environmental regulations. Privatization is the preferred solution to these problems. In some cases, however, privatization of facilities is not feasible due to significant disrepair, remote location, or other reasons. If facilities are not reasonable candidates for privatization they should be considered for outsourcing. In either case, privatization and outsourcing initiatives are often economically advantageous, but the decision to outsource or privatize will not obviate all environmental responsibilities. Consequently, prior to executing those decisions, installation commanders should carefully review what liabilities remain and ensure the installation can meet the requirements.